No. 95-2025

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

THE PEOPLE OF THE STATE OF CALIFORNIA

and

DANIEL E. LUNGREN,
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Petitioners,

v.

KENNETH DUANE ROY, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* ON BRIEF IN OPPOSITION

Respondent Kenneth Duane Roy, through his counsel of record Hill C. Snellings, moves this Court for leave to proceed *in forma pauperis*. Leave to proceed *in forma pauperis* was sought and granted in the United States District Court for the Eastern District of California, and the case has proceeded *in forma pauperis* since that time.

Pursuant to 18 U.S.C. § 3006A of the Criminal Justice Act, the United States District Court appointed Mr. Hill C. Snellings

to represent respondent, and the United States Court of Appeals for the Ninth Circuit continued the appointment on appeal. Hence, pursuant to Rule 39.1 of the rules of this Court, no further affidavit or declaration in compliance with 28 U.S.C. § 1746 is required.

Dated: August 16, 1996

Respectfully submitted,

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QUESTION PRESENTED

Respondent disagrees with petitioners' statement of the question presented by the decision below, and hence provides the following question.

1. Petitioners conceded below that the jury instructions erroneously omitted the specific intent element, but argued that the error was harmless. Did the court below correctly apply Brecht v. Abrahamson, 507 U.S. 619 (1993) and O'Neal v. McAninch, ___ U.S. ___, 115 S.Ct. 992 (1995) to the facts of Mr. Roy's case?

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JURISDICTION

THIS COURT LACKS JURISDICTION BECAUSE THE PETITIONERS WERE NOT PARTIES BELOW.

The petition for certiorari must be denied for lack of jurisdiction because the petitioners were not parties below. Pursuant to 28 U.S.C. § 1254, this Court may review cases in the courts of appeals by "writ of certiorari granted upon the petition of any party to any civil or criminal case . . . ." (Emphasis added.) However, the petitioners here -- the People of the State of California and Attorney General Daniel Lungren -- were not parties to the action below in the district court or in the court of appeals.

On September 10, 1991, Mr. Roy filed his First Amended Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of California. The action was styled Kenneth D. Roy, Petitioner, v. James Gomez, Director of Corrections, and Robert Borg, Warden, Respondents. (See Respondent's Appendix A at 1 (attached).) A verified answer was filed September 20, 1991 on behalf of the responding parties, Messrs. Gomez and Borg, acknowledging that they were the "proper parties" in the habeas action. (See Respondent's Appendix B at 1 & n.1 (attached).) Subsequently, pursuant to a stipulation, the district court ordered William Merkle, Warden, substituted in place of Robert Borg, Warden. (See Respondent's Appendix C (attached).) Thus, neither Mr. Lungren nor the People of the State of California were parties below.

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Because the petitioners here were neither parties nor intervenors below, they may not bring this petition pursuant to 28 U.S.C. § 1254(1). See UAW, Local 288 v. Scofield, 382 U.S. 205, 208-09 (1965) ("only a 'party' to a case in the Court of Appeals may seek review here"); see also Director, Office of Workers' Compensation Programs v. Perini North River Assoc., 459 U.S. 297, 304 n.13 (1983); Supreme Court Rule 12.6.

Accordingly, the petition should be denied for lack of jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In their statement of the case, petitioners misstated and omitted pertinent facts. First, contrary to petitioners' statement, the decision of the three judge panel in the Ninth Circuit was authored by Judge Goodwin of the Ninth Circuit, not an Eighth Circuit Judge sitting by designation. Compare Petition at 6 n.4 with Roy v. Gomez, 55 F.3d 1483, 1484 (9th Cir. 1995).

Second, although petitioners claim that the omission of the specific intent element from the jury instructions was harmless in part because of the evidence before the jury (Petition at 5), petitioners omit from their statement of the case much of the substantial evidence that favored respondent and rendered the trial an extremely close case. For example, although petitioners rely on statements made by jailhouse informant Hudspeth (Petition at 8-9), petitioners fail to inform this Court that the California Court of Appeal found that the jury had rejected that

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informant's testimony. Appendix J at 45 ("They [the jury] disbelieved Hudspeth's testimony.").

Hudspeth, a convicted child molester, provided inherently incredible testimony, claiming that the decedent's pickup truck had been driven from the crime scene, even though in fact the truck was wrecked in a drainage ditch at the scene. (RT 3127, 3133.) Moreover, his testimony was drawn into question because an investigator from the District Attorney's Office had removed the informant from the jail and taken him to various locations involved in the case, thereby undermining the informant's claim that his knowledge of the circumstances was independently based on a statement from Mr. Roy. (RT 3378-79.) Likewise, petitioners fail to note the unusual fact that during the excursion, the informant was taken to the prosecuting attorney's home for a personal interview. (RT 3378-79.) Moreover, the informant's claim that he had been promised no favorable treatment for his testimony was impeached by a letter he had written his wife in which the informant stated, "I hope Mattly [the prosecuting attorney] comes through for me on his promise." (RT 3537; Appendix E at 13.) Furthermore, the investigators took the informant out for a meal at local restaurants on two occasions, and they also bought him cigarettes. (RT 3378-79.)

The other jailhouse informant, Sidney Hall, was impeached with numerous prior felony convictions: he was convicted of two armed robberies in 1956, a second degree burglary and an attempted second degree burglary in 1960, two more second degree

burglaries in 1965, receiving stolen property in 1976, and another second degree burglary in 1979. (RT 3235-36.) He also admitted a conviction in 1982 for assault with a deadly weapon for which he was sentenced to twelve years in state prison. (RT 3196.) In addition, Hall admitted contacting the prosecutor and the judge in an attempt to "make a deal" for favorable consideration. (RT 3237-38.)

Petitioners obliquely comment that the "wounds were consistent with those made by a buck knife." (Petition at 8.) However, petitioners omit the fact that the prosecution's own expert testified that the fatal wound was equally consistent with having been inflicted by the knife of Mr. Roy's companion, McHargue. (RT 2725-26, 2730; Appendix E at 11.)

Also conspicuous by its absence from petitioners' statement of the case is the evidence that Mr. Roy's ABO type A blood was the same as that of the decedent (RT 2807-10, 3764; Appendix E at 15), thus rendering largely insignificant the fact that ABO type A blood was found on Mr. Roy's buckknife.

Petitioners assert that the decedent's "key ring with keys were found among respondent's belongings . . . ." (Petition at 8.) However, petitioners neglect to inform the Court that the prosecution's own investigator testified that the keys did not fit any locks at the decedent's home or place of employment. (RT 3413-14.)

Petitioners purport to relate an admission by Mr. Roy that "he stabbed Clark and claimed Clark had started hassling him."

(Petition at 8 (citing RT 2182-83).) Petitioners neglect to include the balance of the statement, which shows that Clark was not merely "hassling" Mr. Roy, but in fact was attacking him. The record discloses that Mr. Roy said that Clark struck him in the chest and stomach. (RT 2182.) Indeed, there was other testimony that Clark attacked Mr. Roy and hit him in the head with a stick. (RT 3201.)

When both sides of the case are considered, it is apparent that the case was extremely close and the evidence of guilt equivocal.

ARGUMENT

REASONS THE PETITION SHOULD BE DENIED

The petition should be denied at the outset because the petitioners were not parties below. Moreover, certiorari should be denied because at bottom petitioners merely complain that the Ninth Circuit misapplied Brecht v. Abrahamson, 507 U.S. 619 (1993) (harmful and injurious effect on the verdict) and O'Neal v. McAninch, ___ U.S. ___, 115 S.Ct. 992 (1995) (applying Brecht in narrow circumstance of grave doubt) to the facts of Mr. Roy's case, and that is not a persuasive basis for a grant of certiorari. Furthermore, the purported conflict among the lower courts is illusory; the decision below was narrowly based on O'Neal, but none of the supposedly conflicting cases were decided based on O'Neal. In addition, the case below was rightly decided, and, in any event, the issue below is not likely to

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recur because the defective form jury instruction was amended more than a decade ago to remedy the error.

I.

ASSUMING ARGUENDO THAT THIS COURT HAS JURISDICTION, THE PETITION SHOULD BE DENIED BECAUSE THE PETITIONERS WERE NOT PARTIES TO THE ACTION BELOW.

Even if this Court has jurisdiction to grant a petition for writ of certiorari when the petitioners were not parties below, nevertheless this Court, in the exercise of its discretion, should decline to do so here. See Supreme Court Rules 10, 14.1(b), and 14.4.

II.

THE PETITION IS PREDICATED ON THE FALSE PREMISE THAT THE NINTH CIRCUIT DID NOT APPLY THE SUBSTANTIAL AND INJURIOUS EFFECT STANDARD, WHEN IN FACT THE COURT BELOW DID APPLY THAT STANDARD; HENCE PETITIONERS' REASONS FOR GRANTING THE WRIT ARE ILLUSORY.

Below, the Ninth Circuit expressly applied the substantial and injurious effect standard, not some "higher" standard of harmlessness. Roy v. Gomez, 81 F.3d 863, 868 (9th Cir. 1996) (en banc) (Appendix A at 15-16). In fact, citing Brecht v. Abrahamson, the Ninth Circuit expressly recognized that it had to determine whether "the error had a substantial or injurious effect on the jury's verdict, as required when error is raised in collateral proceedings." 81 F.3d at 868 (Appendix A at 14). Thus, contrary to petitioners' claim in their "Question Presented," the Ninth Circuit did not require the prosecution to "meet a higher standard for harmlessness . . . , rather than the

'substantial and injurious effect' standard dictated by Brecht v. Abrahamson." Petition at i (emphasis added; citation omitted).

The Ninth Circuit explicitly applied the Brecht standard as developed and refined in O'Neal:

> [i]n Brecht, the [United States Supreme] Court adopted a stricter standard for harmless error in habeas cases, holding relief is warranted on collateral attack only if the error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 623, 113 S.Ct. at 1714. More recently, the Supreme Court has held relief is also appropriate if the record on collateral review leaves the judge in "grave doubt" as to the effect of the constitutional error. See O'Neal v. McAninch, ___ U.S. ___, ___, 115 S.Ct. 992, 994-95 (1995). Relief was granted in O'Neal because the record was "so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of the error." O'Neal, ___ U.S. at ___, 115 S.Ct. at 995. In such circumstances, "the uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict (i.e., as if it had a substantial and injurious effect or influence in determining the jury's verdict')." Id. at ___, 115 S.Ct. at 994.

Roy, 81 F.3d at 868 (some citations omitted) (Appendix A at 15). Moreover, the Ninth Circuit expressly acknowledged that "[b]ecause this case reaches us on habeas, however, we must determine whether reversal is required under the Brecht/O'Neal line of cases." Roy, 81 F.3d at 868 (Appendix A at 15).

Petitioners erroneously assert that the court below "grafted onto the Brecht federal habeas harmless error standard the narrower method for determining prejudice on direct review of federal cases defined by Justice Scalia in his concurring opinion in Carella." (Petition at 11-12.) However, the court below flatly declared that it was not applying the direct review harmless error standard of Justice Scalia's concurrence in

Carella v. California, 491 U.S. 263 (1989). Noting that the harmless error standard of Justice Scalia's concurrence in Carella was the beyond a reasonable doubt standard from Chapman v. California, 386 U.S. 18 (1967), the Ninth Circuit stated that the "Chapman standard is inapplicable on collateral review . . . ." 81 F.3d at 868 (emphasis added) (Appendix A at 15).

The court below expressly recognized that it was required to follow the Brecht/O'Neal line of cases instead of Carella.

> We are unable to conclude under Carella that the jury necessarily found the missing element; if this case were before us on direct review, the error would not be harmless beyond a reasonable doubt, our analysis would be at an end, and we would be required to reverse the conviction. Because this case reaches us on habeas, however, we must determine whether reversal is required under the Brecht/O'Neal line of cases.

Roy, 81 F.3d at 868 (Appendix A at 15). Thus, the Ninth Circuit looked to the portion of Carella concerning a defendant's right to have a jury find all the elements of the offense. However, the Ninth Circuit did not apply the direct appeal harmless error standard of Carella, but rather applied the collateral review harmless error analysis of the Brecht/O'Neal line of cases.

In sum, the petition is flawed at its inception because it is based on the false premise that the Ninth Circuit applied a "higher" standard of harmfulness, rather than the substantial and injurious effect standard of Brecht and O'Neal. The decision below simply does not present the question that petitioners proffer this Court as a basis for the exercise of certiorari jurisdiction. Accordingly, the petition should be denied.

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III.

PETITIONERS' ARGUMENT THAT THE LEGAL STANDARD WAS NOT PROPERLY APPLIED TO THE FACTS OF THE CASE BELOW IS NOT A REASON FOR THIS COURT TO GRANT CERTIORARI.

Certiorari should not be granted here because the petition in essence is nothing more than an argument that the court below incorrectly applied the governing legal standard. See Rules of the Supreme Court, Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.")

Petitioners insist that the court below applied a "higher standard of harmlessness . . . , rather than the 'substantial and injurious effect' standard dictated by Brecht v. Abrahamson." Petition at i (citation omitted). However, as demonstrated above, the Ninth Circuit expressly applied Brecht's harmful and injurious effect standard as refined and elaborated in O'Neal. Thus, in substance, petitioners' complaint is that the court below misapplied the standard. That does not constitute a persuasive reason for granting the writ.

The fact-bound nature of the petition is underscored by petitioners' contention that the conceded omission of the specific intent element was rendered harmless by the other jury instructions, the evidence before the jury and the jury's factual findings. (Petition at 5.) However, the evidence at trial was evenly balanced, and there were serious problems with the prosecution's evidence and the credibility of its witnesses. The very fact that respondent deemed it necessary to correct the

omissions from the trial evidence in petitioners' statement of the case underscores how fact-bound petitioners' complaint is. See, ante, Statement of the Case. Although petitioners disagree with the conclusion reached by the Ninth Circuit in applying the legal standard to the facts of the case below, that does not augur for granting the petition for a writ of certiorari.

IV.

THE CASE BELOW, NARROWLY DECIDED BASED ON O'NEAL, DOES NOT POSE A SPLIT IN THE CIRCUITS BECAUSE NONE OF PETITIONERS' PROFFERED CASES APPLIED O'NEAL.

Petitioners unsuccessfully strive to wring a conflict among the circuits from the decision below. The purported conflict is illusory.

The Ninth Circuit below expressly applied the harmless and injurious effect standard of Brecht as refined in O'Neal and applied to the rare circumstance of equipoise where the reviewing court finds itself in grave doubt. The decision below arises from such a rare and unusual situation. As the Ninth Circuit recognized, O'Neal was predicated on a situation where "the record was 'so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of the error.'" Roy, 81 F.3d at 868 (quoting O'Neal, ___ U.S. at ___, 115 S.Ct. at 995) (Appendix A at 15). Applying the O'Neal standard, the Ninth Circuit concluded that the instructional error of omitting the specific intent element was not harmless in Mr. Roy's case. Roy, 81 F.3d at 868.

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The decision below does not conflict with the cases from other circuits proffered by petitioners. None of the cases from the other circuits involved application of the O'Neal standard, which by its very nature only arises in the extremely rare and unusual case, where the record is "so evenly balanced[.]" O'Neal, ___ U.S. at ___, 115 S.Ct. at 995 (quoted in Roy, 81 F.3d at 868 (Appendix A at 15)).[1]

All of the collateral review cases that purportedly conflict with the decision below were decided in 1994, before this Court's 1995 decision in O'Neal. (See Petition at 12-14 (citing and discussing Libby v. Duvall, 19 F.3d 733 (1st Cir. 1994);[2] Rosa v. Peters, 36 F.3d 625 (7th Cir. 1994); Cuevas v. Washington, 36 F.3d 612 (7th Cir. 1994)).) Obviously, therefore, none of those cases applied the O'Neal standard, which was the narrow basis for the Ninth Circuit's decision below. Hence, there is no actual conflict between the decision below and the cases of other circuits. The purported conflict is, at most, illusory.

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[1] Petitioners also claim that the opinion of the Ninth circuit three judge panel in Mr. Roy's case "reflects the split among the circuits" because it "was penned by an Eighth Circuit judge sitting by designation." (Petition at 6 n.4.) Petitioners, however, are wrong; the three judge panel opinion was authored by Judge Goodwin of the Ninth Circuit, not an out-of-circuit judge sitting by designation. See Roy, 55 F.3d at 1484 (Appendix C at 4).

[2] Petitioners fail to note that this Court previously denied certiorari in Libby v. Duvall. See ___U.S. ___, 115 S.Ct. 314 (1994) (denying certiorari). At page 12 of the Petition, petitioners mistakenly cite the lead opinion of Libby v. Duvall as appearing at 19 F.3d 753; the citation should be 19 F.3d 733.

Furthermore, petitioners are not even internally consistent in their gloss of the decision below, leading one to question petitioners' claim of inter-circuit conflict. On one hand, petitioners contend that the decision below "was essentially that of the Libby dissent" (Petition at 13), i.e., "the conclusive presumption instruction [was] prejudicial under the Carella framework for determining harmlessness of the instructional error because the jury was 'at least reasonably likely' to have improperly found malice." Id. On the other hand, petitioners assert that the decision below followed the approach of the Cuevas dissent, which petitioners erroneously gloss as "the beyond-a-reasonable doubt approach of Carella . . . ." (Petition at 13-14.) However, the Ninth Circuit clearly stated that it was not applying Carella's beyond a reasonable doubt standard. Roy, 81 F.3d at 868 (Appendix A at 15).

Petitioners also contend that other circuits are in disarray over the harmless error standard on collateral review. (Petition at 14 (citing without discussing Peck v. United States, 73 F.3d 1220 (2d Cir. 1995) (section 2255 case) and Kontakis v. Beyer, 19 F.3d 110 (3d Cir. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 215 (1994)).) Because neither of those cases involved application of the O'Neal standard, they do not present any conflict with the ground of decision below.

Petitioners also cite a bevy of direct appeal cases, asserting that the federal and state courts are confused about the standard to be applied. (Petition at 14 (citing United

States v. Marder, 48 F.3d 564 (1st Cir. 1995); People v. Harris, 9 Cal.4th 407, 37 Cal.Rptr.2d 200, 886 P.2d 1193 (1994); People v. Kobrin, 11 Cal.4th 416, 45 Cal.Rptr.2d 895, 903 P.2d 1027 (1995); United States v. Raether, 82 F.3d 192 (8th Cir. 1996)).)

These cases in fact reflect no "confusion" that is ripe for or requires the intervention of this Court. In Marder, the First Circuit's discussion of the harmless error standards was dicta, and the court did not reach or resolve the issue, basing its decision on an alternate ground. 48 F.3d at 573-74. Likewise in Kobrin, as petitioners acknowledge, the discussion about the standard was mere dicta. (Petition at 14.) Moreover, neither in Harris nor Kobrin did the California Supreme Court purport to be confused or uncertain about the application of harmless error analysis on direct review. Similarly in Raether the Eight Circuit did not display any uncertainty about the proper resolution of the harmless error issue on direct appeal.

However, assuming arguendo that those cases reflect any confusion or division about the harmless error standard on direct appeal, the decision below does not present any conflict with those cases because it did not apply harmless error analysis on direct appeal but rather on collateral review.

V.

THE NINTH CIRCUIT RIGHTLY DECIDED THE CASE BELOW.

In arguing that the Ninth Circuit erred, petitioners mischaracterize the decision below. (Petition at 16-23.) First, petitioners repeat their erroneous claim that the Ninth Circuit

"performed its own beyond a reasonable court analysis following guidelines described in the Carella concurrence, a case addressing the beyond a reasonable doubt standard for direct review of instructional error." (Petition at 18.) However, the Ninth Circuit could not have been clearer when it emphatically declared that the beyond a reasonable doubt standard was "inapplicable on collateral review" and expressly applied Brecht and O'Neal, rather than the Carella beyond a reasonable doubt standard. 81 F.3d at 868 (Appendix A at 15).

Second, petitioners incorrectly assert that the decision below "essentially holds that whenever Beeman instructional error occurs, it is reversible per se." (Petition at 19.) In fact, the Ninth Circuit rejected Mr. Roy's argument that the error was reversible per se, and the Ninth Circuit disapproved its own prior precedents that were susceptible of that construction. 81 F.3d at 866-67 & n.3.

In short, petitioners criticize the court below for positions that the court did not adopt. For all the reasons given in the decision below, Mr. Roy's case was rightly decided.

VI.

PETITIONERS RAISE AN ARGUMENT THAT WAS NOT PRESENTED TO ANY COURT BELOW AND THAT PETITIONERS' COUNSEL CONCEDED AT ORAL ARGUMENT BEFORE THE EN BANC NINTH CIRCUIT HAD NOT BEEN RAISED.

Petitioners argue that the felony-murder special circumstance finding made by the jury demonstrates that Mr. Roy had the requisite specific intent. (Petition at 19.)

Petitioners, however, did not raise that argument in any court below. In fact, in response to questioning from the bench during oral argument before the en banc Ninth Circuit, petitioners' counsel conceded that she had not raised that argument. Pursuant to Rule 15.2 of the Rules of this Court, respondent objects to the presentation of that argument because petitioners did not raise it below, nor did the Ninth Circuit resolve it. See Stern, Gressman & Shapiro, Supreme Court Practice at 368 (6th Ed. 1986) ("normally the Court will not consider points or questions not raised below"). Cf. Youakim v. Miller, 425 U.S. 231, 234 (1976) ("Ordinally, this Court does not decide questions not raised or resolved in the lower court."); Delta Airlines v. August, 450 U.S. 346, 362 (1981) (question presented in petition but not in court of appeals not properly before Supreme Court).

Moreover, consideration of the merits of petitioners' argument would not change the analysis or the outcome because the jury's finding was also contaminated by defective jury instructions and was set aside on direct appeal. (See Appendix J at 21-23, 26, 36.)

VII.

EVEN IF THE DECISION BELOW WERE ERRONEOUS, CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE STANDARD FORM JURY INSTRUCTION WAS AMENDED MORE THAN A DECADE AGO TO REMEDY THE ERROR; HENCE THIS CASE DOES NOT PRESENT AN IMPORTANT ISSUE THAT IS LIKELY TO RECUR.

The concededly erroneous jury instruction omitted the specific intent element of the offense of aiding and abetting. This case does not present an important issue for this Court

because the error in the jury instruction was remedied in 1984, when the California Supreme Court identified the defect. See People v. Beeman, 35 Cal.3d 547, 199 Cal.Rptr. 60, 674 P.2d 1318 (1984) (finding former instruction, such as given at Mr. Roy's trial, inadequate). Thus, the unique error presented by Mr. Roy's case should not recur with any frequency. This is analogous to the situation where a statute has been amended in a manner that will prevent a problem from arising in the future. In that situation, this Court has denied review on certiorari, despite a square conflict among the lower courts. See Stern, Gressman & Shapiro at 200 (citing United States v. Abrams, 344 U.S. 855 (1952); Community Services, Inc. v. United States, 342 U.S. 932 (1952); Sokol Brothers Co. v. Commissioner, 340 U.S. 952 (1951); United States v. Beal, 340 U.S. 852 (1950)).

Accordingly, this Court should decline to grant the petition here.

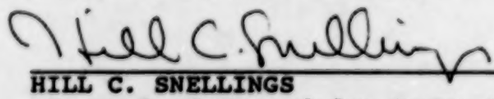
CONCLUSION

For the reasons stated, respondent Mr. Roy respectfully requests this Court to deny the petition for a writ of certiorari.

Dated: August 16, 1996

Respectfully submitted,

BLACKMON, DROZD & SNELLINGS



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RESPONDENT'S APPENDIX A

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KENNETH D. ROY

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

KENNETH D. ROY, Petitioner, v. JAMES GOMEZ, Director of Corrections and ROBERT BORG, Warden, Respondents.	NO. CIV. S-89-1643-LKK/PAN FIRST AMENDED PETITION FOR A WRIT OF HABEAS CORPUS

Kenneth Wayne Roy is now incarcerated at Folsom Prison under the custody of Warden Robert Borg and Director of Corrections James Gomez. Mr. Roy petitions this Court for a writ of habeas corpus because his confinement is in violation of the United States Constitution.[1] This petition is filed pursuant to court order filed June 17, 1991.

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[1] For the convenience of the court, the paragraphs in this petition correspond to the numbered paragraphs in the model form application for habeas corpus under 28 U.S.C. § 2254 as set forth in the appendix to the Rules Governing Section 2254 Cases in the United States District Courts.

1. Mr. Roy attacks the judgment of conviction entered against him in the Superior Court of Shasta County, California in case number 76386 on counts two and four, i.e., the first degree murder of Archie Mannix and the robbery of Archie Mannix.

2. Mr. Roy was convicted on November 8, 1983, and he was sentenced on January 5, 1984.

3. Mr. Roy is now serving a sentence of 46-years-to-life: 16-years-to-life for second degree murder on count one; 25-years-to-life for first degree murder on count two, and five years for robbery on count four.

4. Count one alleged first degree murder of James Clark in violation of California Penal Code section 187; it was further alleged that petitioner used a knife, within the meaning of C.P.C. section 12022(b); special circumstances were alleged as follows: first, that the murder was committed during a robbery, under C.P.C. section 190.2(a)(17)(ii), and, second, that petitioner was charged with another murder in the same proceeding, under C.P.C. section 190.2(a)(3).

Count two alleged first degree murder of Archie Mannix in violation of C.P.C. section 187; it was further alleged that petitioner used a knife, within the meaning of C.P.C. section 12022(b); special circumstances were alleged as follows: first, that the murder was committed during a robbery, under C.P.C. section 190.2(a)(17)(ii), and, second, that petitioner was

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charged with another murder in the same proceeding, under C.P.C. section 190.2(a)(3).

Count three alleged robbery of James Clark in violation of C.P.C. section 211; it was further alleged that petitioner used a knife, within the meaning of C.P.C. section 12022(b).

Count four alleged robbery of Archie Mannix in violation of C.P.C. section 211; it was further alleged that petitioner used a knife, within the meaning of C.P.C. section 12022(b).

On count one, Mr. Roy was convicted of second degree murder; the jury found that Mr. Roy was personally armed with and used a knife.

On count two, Mr. Roy was convicted of first degree murder; the jury found that Mr. Roy was personally armed with and did not personally use a knife.

Mr. Roy was acquitted on count three.

On count four, Mr. Roy was convicted of robbery; the jury found that Mr. Roy was personally armed with and did not personally use a knife.

5. Mr. Roy entered a not guilty plea to all counts.

6. Mr. Roy was tried by a jury, both at the guilt and penalty phase.

7. Mr. Roy did not testify at trial.

8. Mr. Roy appealed his conviction.

9. (a) He appealed to the Third District Court of Appeal, case number C000992.

(b) The court of appeal reversed the special circumstances, and found the aiding and abetting instructional error harmless as to the substantive offenses.

(c) The opinion issued on January 27, 1989.

As a result of the reversal of the special circumstances, Mr. Roy was resentenced after the district attorney decided not to retry the special circumstances. Mr. Roy appealed his new sentence.

(a) He appealed to the Third District Court of Appeal, case number C007071.

(b) The Court of Appeal agreed with Roy that his sentence had been improperly calculated, and remanded for the abstract of judgment to be corrected. In other respects, the judgment was affirmed.

(c) The opinion was filed on September 24, 1990.

10. Mr. Roy's previous petition is described below in paragraph 11.

11. (a) Mr. Roy filed a petition for a writ of habeas corpus in the California Supreme Court. In his petition for a writ of habeas corpus and his points and authorities in support of his petition, Roy claimed that Beeman error violated his due process right to proof beyond a reasonable doubt of all elements of the offense and violated his right to jury trial by

directing a verdict against on the issue of intent. There was no evidentiary hearing, and the California Supreme Court denied his petition without opinion on November 21, 1989.

(b) Mr. Roy has filed no other petition for relief, other than the currently pending petition in this court.

(c) No further petition was filed in any court.

(d) The California Supreme Court, in which Mr. Roy filed his habeas corpus petition is the highest state court.

(e) No appeal lies from an adverse decision of the California Supreme Court.

12. Mr. Roy alleges that his confinement based on counts two and four violates the United States Constitution:

A. GROUND ONE:

On the first degree murder conviction on count two and the robbery conviction on count four, Mr. Roy was denied his right to have the state prove all elements of the offense beyond a reasonable doubt by erroneous jury instructions that failed to require the state to prove or the jury to find that Mr. Roy intentionally aided and abetted the robbery or murder of Archie Mannix.

B. GROUND TWO:

On the first degree murder conviction on count two and the robbery conviction on count four, Mr. Roy suffered a directed verdict and was denied his right to jury trial by

erroneous jury instructions that removed from the jury's consideration, the element of whether Roy had the intent to aid and abet the robbery or the murder of Archie Mannix.

13. Both claims presented here were adjudicated by the California Supreme Court in denying Mr. Roy's petition for a writ of habeas corpus. In his petition for writ of habeas corpus, Mr. Roy alleged that "the trial court's failure to instruct the jury to find the essential element of intent is the functional equivalent of a direct [sic] verdict, in favor of the prosecution. It is further alleged that a directed verdict (1) relieves the jury of finding facts essential to the conviction, withdrawing their power to acquit; and (2) relieves the prosecution of its burden of proving the elements of a crime beyond a reasonable doubt." Petition for a writ of habeas corpus at 5. The points and authorities attached to the state petition for a writ of habeas corpus provide argument and citation in support of both allegations.

14. The only currently pending petition is the previously filed federal petition for a writ of habeas corpus. Leave to file an amended petition and supporting memorandum having been granted by the court at the status conference on May 30, 1991, this petition is filed to amend the previously filed petition.

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15. Mr. Roy has been represented as follows:

(a) at the preliminary hearing by Roger Gilbert, now judge of the Butte County Superior Court;

(b) at arraignment and plea by the above counsel;

(c) at trial by Jerry Kenkel, formerly of 330 Wall Street, P.O. Box 3970, Chico, California, 95927, and by William Patrick, now a judge of the Butte County Superior Court.

(d) at sentencing by William Patrick;

(e) on appeal by Julia C. Newcomb, formerly of the State Public Defender's Office, which is now located at 801 K Street in Sacramento, California; and on subsequent appeal by Paula Schlicter, now a judge in the San Mateo Municipal Court.

(f) on collateral post-conviction proceedings Mr. Roy had no assistance of counsel until this court appointed the Office of the Federal Defender;

(g) there have been no collateral post-conviction appeals.

16. Mr. Roy was sentenced on three counts in the same court and at the same time.

17. Mr. Roy has no <u>future</u> sentence to serve after completion of the sentence imposed by the judgment he now attacks. However, he will continue to serve the sentence of 16-years-to-life imposed on count one, which he is now serving.

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PRAYER FOR RELIEF

Based on the alleged violations of the United States Constitution and for the reasons set forth in the accompanying Memorandum of Points and Authorities, petitioner requests that the Court grant the writ of habeas corpus to release him from his unconstitutional confinement, or grant him a new trial, and grant such other relief as the court deems just and appropriate.

DATED: September 10, 1991

Respectfully submitted,

ARTHUR W. RUTHENBECK
Federal Defender

HILL C. SNELLINGS
Assistant Federal Defender

ARTHUR W. RUTHENBECK
Federal Defender
HILL C. SNELLINGS
Assistant Federal Defender
801 K Street, Suite 1024
Sacramento, California 95814
Telephone: (916) 551-1067

Attorney for Petitioner
KENNETH D. ROY

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

KENNETH D. ROY, Petitioner, v. JAMES GOMEZ, Director of Corrections and ROBERT G. BORG, Warden, Respondents.	NO. CIV. S-89-1643-LKK/PAN CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the Federal Defender for the Eastern District of California and is a person of such age and discretion as to be competent to serve papers.

On September 10, 1991, she personally served a copy of the attached **FIRST AMENDED PETITION FOR A WRIT OF HABEAS CORPUS** as follows:

BY MAIL

Ms. Margaret Garnand Venturi
Deputy Attorney General
P. O. Box 944255
Sacramento, CA 94244-2550

DATED: September 10, 1991

LUPE HERNANDEZ

RESPONDENT'S APPENDIX B

COPY

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Acting Senior Assistant Attorney General
SHIRLEY A. NELSON
Supervising Deputy Attorney General
MARGARET GARNAND VENTURI (State Bar # 088662)
Supervising Deputy Attorney General
1515 K Street
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Sacramento, California 94244-2550
Telephone: (916) 324-5252

Attorneys for Respondents

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KENNETH D. ROY, Petitioner, v. JAMES GOMEZ, ET AL., Respondents.	CIV. No. S-89-1643 LKK-PAN

VERIFIED ANSWER TO FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

(With attached Exhibits 1 - 4)

TABLE OF EXHIBITS

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

COPY

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Acting Senior Assistant Attorney General
SHIRLEY A. NELSON
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Attorneys for Respondents

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KENNETH D. ROY, Petitioner, v. JAMES GOMEZ, ET AL., Respondents.	CIV. No. S-89-1643 LKK-PAN

VERIFIED ANSWER TO FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

COME NOW respondents James Gomez, Director of the Department of Corrections of the State of California, et al.,[1/]

1. The original petition named James Rowland, then Director of the California Department of Corrections, as respondent. Mr. James Gomez is now Director of Corrections, and Mr. Robert Borg is the present warden of Old Folsom prison where petitioner remains incarcerated. Accordingly, pursuant to Federal Rules of Civil Procedure, rule 25, subdivision (d), petitioner has substituted the latter as proper parties and respondents in this habeas action.

and, in answer to the "First Amended Petition for A Writ of Habeas Corpus" ("amended petition") filed in the above-named case on September 10, 1991, by petitioner Kenneth D. Roy, allege:

1. Petitioner is duly and lawfully confined at the California State Prison at Folsom (also known as "Old Folsom"), Represa, California.

2. The prison authorities are holding petitioner pursuant to a lawful judgment and sentence as is reflected in the second amended "Abstract of Judgment -- Prison Commitment" filed December 26, 1990, in *People* v. *Kenneth Duane Roy*, Butte County[2/] Superior Court Case No. 76386 (see declaration of prison case records manager and certified copy of second abstract of judgment, attached hereto as exh. 1). Respondents are informed and believe that this second amended abstract of judgment is the most current abstract of judgment filed in the superior court (see and compare, exh. 2, copy of second amended abstract of judgment certified by the clerk of Butte County Superior Court). Although there apparently remains a need to resolve an issue regarding calculation of petitioner's custody credits (see exh. 1, p. 1 and exh. 3), that issue is not before this Court in the instant habeas action and has no significant impact on the matters raised herein by petitioner.

2. Petitioner in his amended petition (see paragraph 1 at p. 2 of amended petition) and respondent in its answer have mistakenly stated that the judgment against petitioner was rendered in Shasta County Superior Court. However, all state superior court proceedings have been in Butte County, and the judgment against him was rendered in that county (see exhs. 1, 4; see also, exh. C to respondent's answer).

3. Petitioner has been in continuous custody since his original sentencing date of January 5, 1984 (see exh. 3, p. 1).

4. The second amended abstract of judgment under which petitioner is being held reflects that he is serving a minimum prison term of 46 years following his November 8, 1983, convictions by jury trial for second degree murder, first degree murder and robbery plus certain enhancements (exhs. 1, 2; see also pp. 2-3 & 13-14 of exh. 4, opinion of Court of Appeal, Third Appellate District, Case No. 76386, issued September 24, 1990, in petitioner's appeal following his re-sentencing in this case). Specifically, petitioner is serving the upper term of five years on count IV, the robbery charge; a term of fifteen-years-to-life enhanced by one year for use of a knife on count I, the second-degree murder charge; and a term of twenty-five-years-to-life on count II, the first degree murder charge. The terms imposed on all counts are to be served consecutive to each other, and the robbery term is to be served first. (*Ibid.*)

5. In the instant first amended petition for habeas corpus, petitioner for the first time challenges his robbery conviction and continues his challenge to his first degree murder conviction raised in his initial petition (see page 2 of amended petition). In his original petition, and heretofore in these proceedings, petitioner had challenged only his conviction on count II for first degree murder (see page 1 of petitioner's status report filed herein on May 23, 1991; see also original petition, p. 2).

6. On February 5, 1990, respondents filed an answer to petitioner's original petition, and respondents continue to rely on, and incorporate by this reference herein, the allegations submitted in that answer and the memorandum of points and authorities accompanying that answer.

7. In the amended petition, petitioner has again failed to establish that his challenged convictions were obtained in violation of federal constitutional law.

8. Respondents specifically deny that any of petitioner's rights have been violated in any manner.

9. Except as otherwise admitted herein, or as established by a record of proceedings in a competent court, respondents deny each and every allegation in the amended petition and any documents referred to therein or attached thereto.

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WHEREFORE, respondents pray that no order to show cause be issued, that petitioner's application for writ of habeas corpus be denied and dismissed and that petitioner take nothing by this action.

DATED: September 20, 1991.

Respectfully submitted,

DANIEL E LUNGREN
Attorney General of the State of California

GEORGE WILLIAMSON
Chief Assistant Attorney General

ROBERT R. ANDERSON
Acting Senior Assistant Attorney General

SHIRLEY A. NELSON
Supervising Deputy Attorney General

MARGARET GARNAND VENTURI
Supervising Deputy Attorney General

Attorneys for Respondent

MGV:ch
SA89FH0086
September 20, 1991

VERIFICATION

I hereby declare under penalty of perjury under the laws of the State of California that I am a Supervising Deputy Attorney General of the State of California and one of the attorneys assigned to represent respondents in this proceeding, that I have written the above answer to petitioner's amended petition, and that, based on review of the files of the State of California Office of the Attorney General maintained in connection with petitioner's appeals from his conviction at issue in this case and from his re-sentencing, I am informed and believe that the matters alleged therein are true and correct.

Executed this 20th day of September, 1991, at Sacramento, California.

MARGARET GARNAND VENTURI
Supervising Deputy Attorney General
Declarant

COPY

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KENNETH D. ROY, Petitioner, v. JAMES GOMEZ, ET AL., Respondents.	CIV. No. S-89-1643 LKK-PAN DECLARATION OF PERSONAL SERVICE

I declare:

I am 18 years of age or older and not a party to the within entitled cause. I personally served the attached VERIFIED ANSWER TO FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS (With attached Exhibits 1 - 4) in said cause, by personally delivering a true copy thereof [directed to the Attention of HILL C. SNELLINGS, Assistant Federal Public Defender] to the following named person on the date and at the address as follows:

NAME/ADDRESS **DATE**

Hill Snellings September 20, 1991

801 "K" Street, Suite 1024

Sacramento, California, 95814

I further declare, under penalty of perjury, the foregoing is true and correct and that this declaration was executed on September 20, 1991, at Sacramento, California.

MARGARET GARNAND VENTURI
(Typed Name)

Margaret Venturi
(Signature)

(SUBMITTED ON BEHALF OF THE OFFICE OF THE ATTORNEY GENERAL, STATE OF CALIFORNIA, 1515 "K" Street, Post Office Box 944255, Sacramento, CA 94244-2550 -- Attention: MARGARET GARNAND VENTURI, Deputy Attorney General [(916) 324-5252].)

RESPONDENT'S APPENDIX C

BLACKMON & DROZD
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Attorneys for Petitioner
KENNETH D. ROY

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

KENNETH D. ROY,

Petitioner,

JAMES GOMEZ, et al.,

Respondents.

No. CIV-S-89-1643 DFL PAN P

STIPULATION AND PROPOSED ORDER TO SUBSTITUTE WARDEN-RESPONDENTS

Petitioner, Kenneth D. Roy, by and through his counsel, Hill C. Snellings of Blackmon & Drozd, and Respondent-Warden's Robert Borg and William Merkle, by and through their counsel, Margaret Garnand Venturi, Supervising Deputy Attorney General, hereby stipulate and agree to substitute William Merkle in the place of Robert Borg as the Warden-Respondent in the instant habeas petition. This substitution of Warden-Respondents does not effect the substance of the pending habeas corpus petition, but is necessary to reflect the fact that Mr. Roy is now incarcerated under the custody of William Merkle. The

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amended caption would read Kenneth D. Roy, Petitioner v. James Gomez, Director of Corrections and William Merkle, Warden, Respondents.

IT IS SO STIPULATED.

Dated: April 8, 1993

HILL C. SNELLINGS

Dated: April 7, 1993

MARGARET GARNAND VENTURI

IT IS SO ORDERED.

Dated: 4/16/93

DAVID F. LEVI, Judge
United States District Court